IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. .....

LAWYERS COUNTY TRUST COMPANY,

Petitioner,

vs.

WILLIAM REICHERT and PAUL KOLLMAR, individually and as co-partners trading under the name of W. Reichert & Co.,

Bankrupts.

BRIEF FOR BANKRUPTS, WILLIAM REICHERT AND PAUL KOLLMAR, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

William Reichert and Paul Kollmar, individually and as co-partners trading under the name of W. Reichert & Co. respectfully submit the following to this Honorable Court, in opposition to the petition for the writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, made herein by the Lawyers County Trust Company.

Summary and Short Statement of the Matter Involved.

A petition for discharge was made by the bankrupts herein to the District Court and upon the date set for the hearing thereof, the Lawyers County Trust Company, a creditor of the bankrupts, appeared

by counsel who stated to the Court that it wished additional time within which to file specifications of objections to the petition for discharge. Counsel for the creditor did not petition the Court for an adjournment of the hearing itself, but limited his plea to an extension of time for the purpose of filing the specifications. The Court extended the time to file specifications until four o'clock of the same day (R. 91). Thereafter, on the same day, and in the absence of counsel for the bankrupts, a further extension of time to file the specifications was sought and, without any notice to counsel for the bankrupts (R. 94), the Court granted this creditor leave to file its specifications on the following day. The specifications were thus filed and a motion was subsequently made by the bankrupts for an order to vacate the specifications and to enter the discharge of the bankrupts on the ground that the District Court had no power to extend the time to file specifications in view of General Order XXXII, as amended April 17th, 1933 (R. 88-90). Judge Patterson of the District Court granted the motion and rendered an opinion wherein he stated, in part, as follows (R. 97-98):

> "It seems manifest that the judge no longer has power to extend the time for interposing specifications beyond the time fixed in the rule. The dropping of the clause that allowed elasticity must be deemed to have been deliberate and intended to work a change in the practice. * * * The Court had no power to extend the time for filing specifications beyond the return day of the application. The specifications were filed too late and must be disregarded."

The Circuit Court of Appeals affirmed the decision of the District Court and agreed with the Dis-

trict Court that the change in General Order XXXII had been deliberate (R. 110) and for the purpose of removing from the District Court any discretion, which it might have had previously with respect to the extension of time for filing specifications. The decision interprets the change of General Order XXXII by the amendment of April 17th, 1933, in the following manner (R. 110):

> "Before, the Judge had the express power to shorten or enlarge the time for filing specifications of objection, but by the amendment all such power was withdrawn. Indeed, the sole purpose of the amendment, aside from including an extension proposal within its coverage, seems to have been to do away with this express power and more strictly limit the opportunity to create delays in administration, even at the expense of some flexibility."

Reasons Relied on for Denial of Writ.

(1) The decision of the Circuit Court of Appeals for the Second Circuit, logically and properly construes General Order XXXII, for this Order is mandatory in its terms and conditions and permits the District Court no exercise of discretion to vary or extend the terms and provisions.

Prior to the amendment of General Order XXXII on April 17th, 1933, its context was as follows:

> "A creditor opposing the application of a bankrupt for his discharge, or for the confirmation of a composition, shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall file a specification in writing of the

> grounds of his opposition within ten days thereafter, unless the time shall be shortened or enlarged by special order of the judge."

The amendment altered it to read:

> "A creditor opposing an application for discharge, or for the confirmation of a composition or extension proposal, shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall at the same time file a specification in writing of the grounds of his opposition."

The substance of the General Order was retained in its amended form, except in three respects; (1) specifications of objections to extension proposals are included within the scope of the Order; (2) all specifications must be filed on the day set for the hearing; and (3) the clause granting the discretionary power to extend or vary the time for filing the specifications has been deleted in its entirety and forms no part of the amended order.

In the words of the Circuit Court of Appeals, Second Circuit (R. 110), "The change was, of course, deliberate, and appears to us to be highly significant". The omission of the discretionary clause was deliberate and solely for the purpose of compelling the filing of the specifications on the return day. The deliberateness and significance of the deletion becomes all the more apparent upon an inspection of the blanket order of April 17, 1933. Of all the General Orders included in the blanket order and dealing with the time within which pleadings must be filed, General Order XXXII is the only Order from which the discretionary clause has been omitted. General Order XXXI, Subdivision 3, dealing with the filing of objections to a proof of assignment of claim in bank-

ruptcy, and General Order *L*, Subdivision 4, dealing with confirmation of farmers petitions for relief under section 75 of the Bankruptcy Act, are each General Orders governing the time within which to file pleadings. Like General Order XXXII, they were part of the blanket order of April 17th, 1933, yet each of these orders contains the specific authorization for the exercise of discretion with reference to extension of time to file pleadings. The inclusion of such authorization in General Orders *L* and XXXI and its deletion in General Order XXXII is significant and can only lead to the conclusion that this Court in amending General Order XXXII proposed to remove from the District Court any discretionary powers which it might have had with respect to extension of time to file specifications.

The significance of this omission was pointed out by Hincks, *J.*, in the matter of *Re Hodges,* 4 Fed. Sup. 804, affirmed on other grounds, C. C. A. 2nd, April 2nd, 1934, 10 F. (2) 243, wherein the Court sustained the contention of the bankrupt that the terms of General Order XXXII were mandatory and that there, therefore, remained no discretionary power in the District Court to vary or enlarge the filing period.

Lowell, *J.*, in *Re Corcoran,* 4 Fed. Sup. 988, also took cognizance of the apparent purpose of the amendment and denied the motion of a creditor to open his default and to permit him to file specifications subsequent to the date set for the hearing upon the discharge. The denial of the motion was based solely on the ground that General Order XXXII would not permit the exercise of any discretion in extending the time for filing such specifications.

Indeed, it is evident that the sole purpose of the amendment, aside from including an extension proposal within its scope was to do away with this discretionary power and more strictly limit the opportunity to create delays in administration, even at the expense of some flexibility. This Court was surely cognizant of the fact that creditors employed the ten day period and the extended period for the purpose of dealing with bankrupts to obtain preferences. The Attorney General's Report on Bankruptcy Law and Practice (Senate Document #65, 72nd Congress, First Session) and the "Donovan" Report on the Administration of Bankrupt Estates (House Committee Print, 71st Congress, 3rd Session), cited by the petitioner herein, state in detail the practice and its prevalency. The petitioner states that this Court undoubtedly had these reports before it, but that the real purpose of the amendment was to delete the provision giving the creditor ten days "as of right", although still permitting the District Court to grant enlargements on "good cause shown". The fallaciousness of this conclusion is apparent. The retention by the District Court of such discretion would in no way tend to correct the evil practice which this Court attempted to destroy, for it is obvious that the facts upon which an unopposed application for extension might be based could be such that the Court could not verify their truth or falsity. In many of the cases wherein creditors have attempted to deal with bankrupts, the ten day period had been extended for alleged "good cause shown". "Good cause" can always be made out and because of the fact that it was impossible for the Court of its own motion, to verify such "good cause", the practice continued.

If the petitioner's interpretation of General Order

XXXII is the correct one, then we must conclude that this Court has failed to provide proper weapons to combat the evil practice. This Court did not contemplate the making of a futile order. And such it must be if the District Court is to retain this power.

In substantiation of its contention, the petitioner cites Remington on Bankruptcy, Volume 7, section 3201, page 427 (1934). We must dismiss the views advanced by Mr. Remington as being based upon a misinterpretation of General Order XXXII. The Court will observe that the author is under a mistaken impression that General Order XXXII requires an appearance in writing. From that premise, he urges that the filing of an appearance in writing would be superfluous, as specifications which are required by the order to be filed on the same day, are, in themselves, an appearance. He does not believe that the Supreme Court intended a double requirement and, therefore, concludes that the Supreme Court must have intended that specifications might be filed at a later date. The fallacy in this argument is apparent for there nowhere appears any provision or requirement for a written appearance in opposition and the implication which he draws would not follow even if such an appearance were necessary. It should also be noted that Mr. Remington bases his argument solely upon decisions rendered previous to the amendment of General Order XXXII and which are, therefore, not in point.

(2) The decision of the Circuit Court of Appeals for the Seventh Circuit is erroneous and is based upon a misinterpretation of the terms, purposes, and effect of General Order XXXII.

The case of *In re Lerner,* 70 Fed. 2d, 938, C. C. A. 7, has been cited by the petitioner as conclusive of

the fact that General Order XXXII has not deprived the District Court of the power to grant extensions of time within which to file specifications of objections to the discharge of the bankrupt. The Court, in the *Lerner* case, *supra,* at page 939, states as follows:

> "We are not persuaded that the amended order was intended to so restrict or limit the Court who is, of necessity, in the best possible position to determine whether extensions of time should be granted or whether pleadings should be amended."

The decision in the aforementioned case is apparently based upon the premise that specifications of objections are such pleadings as are subject to the general power of the Court to grant extensions of time and to amend such pleadings (General Order XXXVII). It seems to us that the conclusion of the Circuit Court of Appeals, Second Circuit, is the more logical one. The Court therein stated as follows (R. 110-111):

> "That the specifications of objections must be considered a part of the pleadings is evident. Yet we do not think such specifications can properly be classed with pleadings generally and the time for filing varied in the discretion of the judge because for many years they have for this purpose been especially dealt with in General Order XXXII and still are. That order has the force of a specific statute relating to its subject matter, *Wilkinson* v. *Walker,* 292 Fed. 395, and must, under familiar rules of construction, take precedence over general legislation which might otherwise control. The change was merely one of procedure and not of any substantive provisions of the law and so clearly within the power of the Supreme Court."

It is apparent that the foregoing opinion is based upon the fundamental principle of statutory construction that specific legislation takes precedence over general legislation. The Court, in the *Lerner* case, seems to have overlooked this principle of law in its interpretation of General Order XXXII. The Circuit Court, in deciding the *Lerner* case, *supra,* gives no reason for its denial of the unmistakable mandate contained in the language of General Order XXXII, other than its belief that the District Court, being a General Court of Equity, still retained its "discretion in matters that are primarily those of pleading". That Court seemingly based its opinion upon the provisions of General Order XXXVII which cannot be set up herein as the basis for the contention that the Bankruptcy Court has been permitted to retain the right to "vary the time allowed for return of process". The title of this General Order is "General Provisions" and the wording of this title is indicative of the effect and purpose of the order itself. It is merely a statement as to the powers of the Bankruptcy Court generally and is at all times subject to the provisions of the specific statute or order. General Order XXXVII is limited in its scope and effect by the terms and provisions of General Order XXXII, which contains a specific provision with respect to the time within which specifications must be filed.

It should also be pointed out to this Court that the Circuit Court in *Re Lerner, supra,* has apparently misconstrued the terms of General Order XXXII. In its opinion, the Court states as follows:

> "The order does fix the time within which objections shall be filed. Specifications are merely elaborations of the objections. The

> order does not, however, prescribe procedure in case objections are made within the designated time.
>
> (2) Objections, we take it, may be made orally in open court. Having been thus made, they should be reduced to writing and filed on or before the return day. They must likewise be accompanied by or followed by specifications * * *."

A reading of the general order does not make evident just what are the objections which are referred to. Other than the specifications and the appearances, no mention is made of any additional pleading to be filed or entered on the return day. The nature of the objections referred to are not disclosed by the Court, excepting in its statement that "objections, we may take it, may be made orally in open Court". No provision has been made for oral objections and any discussion based upon the presence of such objections must be deemed without merit.

The statement, therefore, by the Court that objections may be made on the return day and that specifications which are merely "elaborations of the objections" may be filed at a later date must be disregarded.

(3) The decision in *McIntosh* v. *Seymour,* 292 U. S. 652, cannot form the basis for any conclusion that the Supreme Court has decided the questions involved herein.

This Court, on June 4th, 1934, denied the petition for a writ of certiorari in the case of *McIntosh* v. *Seymour,* without setting forth the reasons for such denial. The petition was for a certiorari to the deci-

sion of the Circuit Court of Appeals, for the Ninth Circuit, wherein the Court, exercising its discretion under Section 24b of the Bankruptcy Act had refused to allow an appeal from an order denying the motion of the bankrupt to dismiss the specifications. This case can form no part of the discussion herein as the denial of the writ was no doubt made on the ground that the decision of the Circuit Court of Appeals for the Ninth Circuit was merely a discretionary refusal to allow an appeal and that, therefore, this Court did not have jurisdiction to entertain the writ (*Ferguson* v. *District of Columbia,* 270 U. S. 633).

(4) Decisions interpreting General Order XXXII prior to its amendment in 1933 are wholly irrelevant and superannuated and cannot form the basis for the contention that the Bankruptcy Court has the power to grant extensions of time to file specifications.

WHEREFORE your petitioners respectfully pray that the petition for writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit be denied and that review of the decision of such Circuit Court be refused.

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